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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL D. SHAW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0606-CR-497
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-9903-CF-28

February 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Michael Shaw appeals his sentence following his guilty plea for Child Molesting, as a Class A felony. He presents the following issues for our review:

1. Whether the trial court violated his Sixth Amendment right to have aggravating factors determined by a jury, in violation of Blakely v. Washington, 542 U.S. 296 (2004).

2. Whether the trial court abused its discretion when it identified and weighed aggravators and mitigators.

3. Whether his sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On March 22, 1999, Shaw entered his then-ten-year-old daughter's bedroom, pulled her pajama bottoms to one side, and "put his tongue on her vagina." Appellant's App. at 20. Shaw admitted those facts to police when he was interviewed. Accordingly, the State charged Shaw with child molesting, as a Class A felony, and incest, as a Class B felony. Shaw and the State entered into a plea agreement whereby Shaw pleaded guilty to child molesting, and the State dismissed the incest charge. The plea agreement provided that Shaw's sentence would be capped at thirty-five years.

At sentencing, the trial court identified four aggravators, namely: criminal history, he committed another offense while on bond for the instant offense, violation of a position of trust with the victim, and that he is in need of correctional treatment that can best be provided by a penal facility. The trial court did not identify any mitigators. The court imposed a thirty-five year sentence. This belated appeal ensued.

DISCUSSION AND DECISION

Issue One: Blakely

Shaw first contends that the trial court erred when it identified certain facts not found by a jury as aggravators, in violation of Blakely v. Washington, 542 U.S. 296 (2004). But the State points out that the trial court identified two valid aggravators that do not violate Blakely, which are sufficient to support Shaw's enhanced sentence. We agree with the State.

Shaw concedes that the trial court's identification of his criminal history as an aggravator does not violate Blakely. But Shaw asserts that the position of trust aggravator constitutes a Blakely violation. In support of that contention, Shaw cites to Trusley v. State, 829 N.E.2d 923 (Ind. 2005). There, the trial court listed several aggravators, including that Trusley had abused a position of trust. Trusley appealed, arguing in part that the position of trust aggravator was neither found by a jury nor admitted in accordance with the holding in Blakely. Our supreme court found that the position of trust aggravator was supported factually by Trusley's admission that she was the victim's day care provider. The court noted that "the [trial] court did not enhance the sentence on the grounds that Trusley was both in a position of trust and [the victim's] day care provider. Rather, it supported the position of trust aggravator by reference to the admitted fact that Trusley was Small's day care provider." Trusley, 829 N.E.2d at 927.

The supreme court's opinion in Trusley may be confusing when it states, "[o]f course, as we said in Morgan, judicial statements such as 'in a position of trust' cannot 'serve as separate aggravating circumstances.'" Trusley, 829 N.E.2d at 927 (citing

Morgan v. State, 829 N.E.2d 12, 17 (Ind. 2005)). But the supreme court did not hold in Trusley that abuse of a position of trust may not be used as an aggravator. And despite the apparent implication of the language quoted from Trusley, the court in Morgan did not so hold. Rather, in Morgan, the court held that statements such as those that are "'derivative' of criminal history[] are legitimate observations about the weight to be given to facts appropriately noted by a judge alone under Blakely. [But] they cannot serve as separate aggravating circumstances." Morgan, 829 at 17. Read together, Morgan and Trusley stand for the rule that facts derivative of and/or supporting an aggravator may be used to prove an aggravator but may not be used, by themselves, as separate aggravators.

Here, Shaw admitted that he is the victim's father. Accordingly, the trial court's identification of the position of trust aggravator does not violate Blakely. The trial court identified two valid aggravators. Because we determine, below, that those two aggravators are sufficient to support Shaw's enhanced sentence, we need not discuss the other two challenged aggravators under Blakely.

Issue Two: Aggravators and Mitigators

Shaw asserts that the trial court improperly identified and weighed aggravators and mitigators when it imposed an enhanced sentence.[1] The determination of the appropriate sentence rests within the discretion of the trial court, and we will not reverse the trial court's determination absent a showing of manifest abuse of that discretion. Bacher v. State, 722 N.E.2d 799, 801 (Ind. 2000). The trial court's wide discretion

[1] Again, Shaw was sentenced in 1999. Thus, although the sentencing statutes were amended in 2005, we analyze Shaw's claims under the law applicable to the prior sentencing scheme.

extends to determining whether to increase the presumptive sentence, to impose consecutive sentences on multiple convictions, or both. Singer v. State, 674 N.E.2d 11, 13 (Ind. Ct. App. 1996). If the sentence imposed is authorized by statute, we will not revise or set aside the sentence unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B); McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001).

Here, at sentencing, the trial court identified two valid aggravating circumstances, namely, Shaw's criminal history and his violation of a position of trust with the victim. The court did not identify any mitigating circumstances. Under the applicable sentencing scheme, the presumptive sentence for a Class A felony was thirty years, and the trial court was permitted to add up to twenty years for aggravating circumstances. See former Ind. Code § 35-50-2-4. The trial court imposed a thirty-five year sentence.

Shaw contends that the trial court should not have imposed an enhanced sentence. Specifically, he maintains that the trial court should have identified as mitigators his remorse, his guilty plea, the fact that he was sexually abused as a child, and his criminal history. A finding of mitigating circumstances lies within the trial court's discretion. Widener v. State, 659 N.E.2d 529, 533 (Ind. 1995). The trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Chambliss v. State, 746 N.E.2d 73, 78 (Ind. 2001). And the sentencing court is not required to place the same value on a mitigating circumstance as does the defendant. Beason v. State, 690 N.E.2d 277, 283-84 (Ind. 1998).

Our review of the transcript indicates that the trial court expressly rejected Shaw's show of remorse as a mitigator. And we give substantial deference to a trial court's evaluation of remorse. See Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004) (noting trial court is in best position to determine whether defendant's remorse is genuine). In addition, not every guilty plea must be credited as a mitigating circumstance. Wilkie v. State, 813 N.E.2d 794, 799 (Ind. Ct. App. 2004), trans. denied. Shaw received a benefit in that one of his charges was dismissed in exchange for his plea and his sentence was capped at thirty-five years, fifteen years short of the statutory maximum. See, e.g., Haggard v. State, 771 N.E.2d 668, 677 (Ind. Ct. App. 2002) (holding trial court did not abuse its discretion when it gave no mitigating weight to guilty plea where defendant received benefit but uncertain whether State reaped reciprocal benefit). Further, while Shaw's victim was spared the trauma of having to testify at trial, she did undergo a deposition prior to the plea agreement. The trial court did not abuse its discretion in not finding Shaw's guilty plea mitigating.

Finally, Shaw does not cite to any authority in support of his contention that his own victimization as a child warrants mitigating weight. Indeed, our court has held that a trial court does not abuse its discretion when it declines to find a defendant's troubled childhood to be mitigating. See Rose v. State, 810 N.E.2d 361, 366 (Ind. Ct. App. 2004). Shaw has not demonstrated that the trial court abused its discretion in declining to identify any of his proffered mitigators.

Shaw also contends that the trial court gave too much aggravating weight to his criminal history. In particular, he maintains that "all of the [prior] offenses were

misdemeanors and involved substance abuse and driving violations. It is difficult to see how these offenses might relate to the instant offense of child molesting." Brief of Appellant at 10. But, according to the presentence investigation report, Shaw admitted to having eight beers, a "couple of shots" of rum, and marijuana during the four and one-half hours prior to the molestation. Green Appendix at 1. And Shaw stated that he would not have committed the molestation if he had been sober. Thus, his four prior misdemeanor substance abuse convictions are relevant to the instant offense. In addition, the fact that Shaw was convicted of eight misdemeanors in under four years is significant.

Moreover, the violation of the position of trust Shaw had with his daughter warrants significant aggravating weight. A position of trust, without more, can support the maximum enhancement of a sentence for child molesting. See McCoy v. State, 856 N.E.2d 1259, 1262 (Ind. Ct. App. 2006). Here, the trial court imposed the maximum sentence allowed under the terms of the plea agreement, which is fifteen years below the statutory maximum sentence. Given the position of trust aggravator and Shaw's criminal history, we cannot say that the trial court abused its discretion when it identified those two valid aggravators and imposed an enhanced sentence of thirty-five years. See Pickens v. State, 767 N.E.2d 530, 535 (Ind. 2002) (noting when a trial court improperly applies an aggravator, a sentence enhancement may be upheld if other valid aggravators exist).

Issue Three: Appropriateness of Sentence

Finally, Shaw contends that his sentence is inappropriate in light of the nature of the offense and his character. Shaw supports that contention with the same argument

that he proffers regarding Issue Two. We disagree with Shaw that his enhanced sentence is inappropriate.

Given the violation of the position of trust Shaw held with his daughter and the nature of the offense, generally, the crime is especially heinous. And we cannot say that Shaw's character warrants a lesser sentence. We acknowledge Shaw's relatively solid employment history and apparent family support structure, but he has a long history of substance abuse and has been unable or unwilling to resolve that serious problem. As the trial court observed, "we have a long history of alcohol and drug violations, a long pattern. There have been prior attempts at rehabilitation without any effect to the community." Transcript at 64. And, regarding Shaw's show of remorse, the trial court stated, "I think you're remorseful over being in the situation, [but] I can't see much remorse in terms of understanding of the effect that it had on the victim." Id. In short, we cannot say that the thirty-five year sentence is inappropriate in light of the nature of the offense or Shaw's character.

Affirmed.

MAY, J., and MATHIAS, J., concur.